

0.01 to 25% by weight".

The examiner states that "Pawelek et al disclose a composition that includes melanin to be used in a sun screen". The examiner points to col. 2, lines 35 - 37. These lines do not point to any composition. In line 31 there is a statement that melanin may be included in composition to be applied to mammalian skin and hair. The examiner further points to col. 8, lines 39 - 41 where melanin can be prepared. No such preparation can be found in these lines. Lines 30 - 38 are reproduced below:

Source of enzymes

The enzyme preparation for the synthesis of soluble melanin can be obtained from any biological cells or tissues which have the ability to produce melanin, for example:

(1) extracts of vertebrate skins from horses, cattle, sheep, pigs, or any mammalian source; extracts of skins of fish, amphibia, reptiles, birds, or any other such vertebrate source.

There is no disclosure or suggestion that this melanin of Pawelek may be combined with metal oxides or green tea or any combination thereof.

The examiner takes the position that although McCook and Rigal disclose using green tea extracts from 0.01 to 10% by weight and 1 to 2%, respectively, it was obvious to one skilled in the art to increase the amount of green tea extract hence, the greater amount of polyphenols (i.e. antioxidant) in the composition. The question is: whose composition? McCook and Rigal, both are experts in the art, and they did see fit to recognize such increase as is proposed by the examiner. It is pointed that 35 U.S.C. 103 makes reference to one having ordinary skill in the art.

The examiner comes to the conclusion that one of ordinary skill in the art would have been motivated to combine Rigal et al. with McCook et al. and Pawelek et al. because Rigal with McCook both taught using green tea extract and titanium

dioxide or zinc oxide for a composition that can be used as a sun screen. Pawelek teaches that melanin in a sun screen composition is an advantage.

There is no teaching that melanin should be added to the composition of Rigal.

There is no teaching that melanin should be added to the composition of McCook.

There is no teaching in Pawelek of any teaching of a composition. There is shown just a method of producing melanin and the product produced by the method. See the claims in Pawelek.

The question now is: where does the examiner obtain the teaching or suggestion to add melanin to the compositions of Rigal or McCook?

It has long been held that a teaching under 35 U.S.C. 103 must flow from the reference cited or must be derived from known facts. None of the above is observed by the examiner. It has long been held that the examiner cannot derive any teachings to make modifications from applicant's specification. If the examiner insists on repeating the above rejection she must identify where the teachings are coming or derived from.

The combination of three references to reject all the claims is also very problematic. The examiner has used McCook to modify Rigal in a modified combination and then has used Pawelek to modify again the modified combination. The former CCPA and the now CAFC have frowned upon such a claim rejection.

In view of all of the above, the examiner is respectfully requested to reconsider the objections and rejections made and to pass this application to an early allowance

A handwritten signature in black ink, appearing to read 'P. Zahner', with a stylized, cursive script.

Peter Zahner

Date: 3/16/05